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NO. 89-1416

IN THE

Supreme Court Of The United States

October Term, 1989

AIR COURIER CONFERENCE OF AMERICA,
Petitioner,

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO FEDERAL RESPONDENT'S OPPOSITION

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The Acting Solicitor General, on behalf of the federal respondent United States Postal Service, acknowledges that the court of appeals erred in its determination that the Unions had standing to attack the remail rule, Federal Respondent's Opposition at 7-8 (F.R. Opp.) and agrees that the Air Courier Conference of America (ACCA)[1] is a proper petitioner, *id.* at 6, fn. 1. The Postal Service, nevertheless, opposes certiorari and contemplates remand to the Postal Service for further rulemaking

[1] ACCA has no parent or subsidiary corporations.

proceedings, *id.* at 10, because the Postal Service erred in arguing, and the court of appeals erred in relying upon the "zone of interest" test of standing as articulated by the Court in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987). *Id.* at 8.

The thrust of the Postal Service's opposition is that: (1) this is not an APA case, because the complaint did not cite 5 U.S.C. § 702, *id.* at 7; (2) this cannot be an APA case, because (a) 39 U.S.C. § 410 (b) exempts the Postal Service from the APA and (b) because the Postal Service's adoption of APA rulemaking is, at most, a voluntary submission to chapter 5 rulemaking procedures, but not to chapter 7 judicial review, *id.*; and (3) that the Unions may never have properly invoked jurisdiction, because they cited no other sovereign immunity waiver statute, *id.* at 8-9, fn. 2. Accordingly, the Postal Service contends, the court of appeals erred in relying upon the *Clarke* test for its analysis of the zone of interest test of standing because *Clarke*, as an APA case, is not applicable.

ACCA agrees with the Acting Solicitor General's contention that the zone of interest test of standing applies in APA cases; that non-APA cases require something more; and the additional requirements of non-APA cases have never been briefed. The courts below assumed that § 702 was the basis for the complaint, because no other jurisdictional basis was ever articulated and the federal respondent so assumed in its briefs. Thus, if the federal respondent is now correct that this is not and cannot be a § 702 case, but should have been brought under some other provision waiving sovereign immunity, say 39 U.S.C. § 409, ACCA agrees that the distinctions between standing under § 702 and standing under § 409 or some other provision have not been briefed. If this Court accepts the federal respondent's new position or believes it needs a new record on such further briefing, however, rather than denying certiorari, it should vacate the district court and court of appeals decisions and remand for further proceedings on that issue.

For the court simply to deny certiorari, without more, would implicitly uphold the court of appeals' decision; return the case for further rulemaking in accordance with that decision, in spite of its arguable jurisdictional deficiencies; and cause added confusion as to the zone of interest test, particularly in the context of the Private Express Statutes.

Nevertheless, ACCA believes that this case is appropriate for certiorari and ripe for review, because the zone of interest test is a necessary part of standing under both APA and non-APA cases. See *Clarke* fn. 16 at 400-401; *American Postal Workers Union, AFL-CIO, Detroit Local v. Independent Postal System of America*, 481 F.2d 90 (6th Cir. 1973), *cert. dismissed*, 415 U.S. 901 (1974) (*APWU v. IPSA*).[2] The Postal Service has not argued, nor offered any authority for the notion, that the zone of interest test in APA cases is any different than the zone of interest prong of standing under non-APA cases. There is nothing in footnote 16 of *Clarke* that could be construed as specifically limiting its discussion of the test to § 702 cases. Thus, the clarification of the zone of interest test sought by ACCA's petition is of identical importance, whether or not this is a § 702 APA case or not.

Absent vacation of both decisions below, denial of certiorari would serve only to mislead the lower courts in their attempts to analyze the zone of interest of the postal monopoly laws in both APA and non-APA cases. In addition, ACCA

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[2] The Postal Service attempts to distinguish *APWU v. IPSA*, *supra* on the grounds that it was not an APA case and predates *Clarke*. F.R. Opp. at 9. That the Sixth Circuit considered the zone of interest of the postal monopoly laws in a non-APA case hardly distinguishes that case from this one where the District of Columbia Circuit considered the zone of interest of the same law on a complaint that did not invoke the APA. Moreover, the fact that the Sixth Circuit's decision pre-dates *Clarke*, does not support any delay in this Court's clarification of the zone of interest test, particularly as it applies to the postal monopoly laws, given that the District of Columbia Circuit based its decision on an erroneous interpretation of *Clarke*.

would be forced to defend the remail rule in a remanded proceeding before the Postal Service ordered by a court that the federal respondent contends "clearly" lacked jurisdiction.

Respectfully submitted,

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